United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 2250.

797

ERNEST M. COLLINS, APPELLANT,

vs.

JOHN W. DANFORTH COMPANY, OF BUFFALO, NEW YORK, A CORPORATION.

Additional Brief on Behalf of Appellant.

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The liability of the defendant is predicated upon its negligence. If an examination of the record shows any facts that tend to show negligence on the part of the appellee, then the trial court erred in peremptorily instructing the jury to return a verdict for the defendant, and the case should be reversed.

In our view of the case it is not necessary to quarrel with the authorities cited by the appellee upon their brief. These authorities in substance hold that where a man who is a building owner or a general contractor erecting a building furnishes a pile of general or miscellaneous lumber to a mason, bricklayer or carpenter for the purpose of building a scaffolding, the scaffolding to be built under the supervision of such mason, bricklayer or carpenter, and without any supervision on the part of the building owner or general contractor, and in such

general pile of lumber or miscellaneous lumber, it is affirmatively shown that there is sufficient good and safe material for the purpose of erecting the scaffolding, and the scaffolding is not afterwards adopted by such general contractor or building owner, or used by him for a purpose other than that for which it was erected, there is no liability against such general building owner or general contractor.

The case at bar presents an entirely different proposition of law. It is the case, not of a general building owner or general contractor, but of a contractor engaged in a particular line of business, in this case steamfitting, whose duty it is not to furnish general lumber in the general progress of the work, but to furnish lumber particularly adapted to the object for which it is furnished; and therefore when there is furnished any lumber that is unsafe and unsound and not particularly adapted for the object furnished, there is negligence on the part of such person so furnishing the same, and if an injury results from such negligence the party so injured has a cause of action.

In the case of Barclay *vs.* South Atlantic Waste Company, 61 S. E. Rep., 655 (N. C., May 6, 1905), the plaintiff offered evidence to show that he was a carpenter in the defendant's service; that one Michael was the foreman of carpenters, and came to plaintiff and ordered him to go into the factory, which had been damaged by fire and was being repaired; that plaintiff did go into the factory, and upon a scaffolding that was being erected by the carpenters, and that by reason of the defective material in the scaffolding he was injured.

The contention was made on the part of the defendant that there was no liability because the defendant owed to the plaintiff only the duty to exercise ordinary care in the selection of his fellow-servants, and in fur-

nishing a sufficient quantity of fit and suitable material out of which he and his fellow-servants could construct the scaffolding.

In disposing of this contention the court said:

> "In the view we take of this case it is unnecessary to consider whether the plaintiff was injured by the negligence of a fellow-servant. Assuming the standard of duty which defendant owed plaintiff to be as stated in the elaborate brief of the learned counsel for defendant—that 'the only duty the defendant owed to the plaintiff in regard to the scaffold was to exercise ordinary care in the selection of his fellow-servants, and to furnish a sufficient quantity of fit and suitable material out of which he and his fellow-servants could construct the scaffold'—we think his honor erred in sustaining the motion to nonsuit. The defendant owed to its employees who were directed to work on this scaffold the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. 2 Labatt, sec. 614; Bushwell on Personal Injuries, secs. 193, 391, 392; Brewing Co. *vs.* Wood, 87 S. W., 774, 27 Ky. Law. Rep., 1012; 4 Thompson Neg., sec. 3957, note 30; Stanwick *vs.* Butler-Ryan Co., 93 Wis., 430, 67 N. W., 723; Phoenix Bridge Co. *vs.* Castleberry, 131 Fed., 181, 65 C. C. A., 481. If defendant delegated the performance of this duty to Michael, it is responsible for the manner in which he discharged it. Tanner *vs.* Lumber Co., 140 N. C., 475, 53 S. E., 287; Avery *vs.* Lumber Co. (at this term), 60 S. E., 646; McCarthy *vs.* Claflin, 99 Me., 290, 59 Atl., 293. The evidence of witness Wooten is to the effect that the scaffold was built of old material that was scorched in the fire when the building was burned. There is also evidence that the wood was knotty, and that the piece which gave way was broken at a knot. These facts, if true, do not per se constitute negligence; but we think they are some evidence to be considered by the jury as

> bearing upon the inquiry as to whether the defendant exercised reasonable care in selecting material suitable for the constructing of a lofty scaffold upon which its servants were required to work."

The case of Farrell *vs.* Eastern Machinery Company, 68 L. R. A., 239 (Supreme Court of Connecticut, January 4, 1903), is strictly in point.

In this case the defendant manufactured and installed elevators, and in order to properly install them had certain lumber that was used for scaffolding purposes. Farrell, an employee, was directed to get this lumber and to erect a scaffold, and he did so. It was necessary to have the scaffolding strong enough to bear the weight not only of two men working upon it, but the additional strain incident to the lifting of certain material. While erecting the scaffolding there was placed thereon a certain piece of lumber with a knot in it; at first such piece was tested by jumping upon it; two planks, including the one with the knot, were used. The one contained a knot plainly visible extending nearly across its width and through its entire thickness. While Farrell was standing on the platform formed of the two defective planks, and engaged in lifting and pushing into position one of the sheaves, the planks broke and he was hurled from the platform, and from the injuries received died. The break occurred about midway of the span, and at a point in the bottom plank where the knot was.

The contention of the defendant was that it owed no duty to Farrell in regard to the staging, other than to use reasonable care to provide reasonably suitable and safe material for its erection, it being contended that there was sufficient lumber in the larger supply from which proper staging could have been taken.

The court, after stating this proposition of the defendant, said:

> "We have, then, this situation: The defendant, as master, is to be charged with no dereliction in duty which arose subsequent to the time when Maynard ordered Farrell to go to the factory room, where staging material was stored, to obtain that which was to be used at the wire company's building. Maynard's acts from that time on are to be treated as those of a servant only—as the fellow-servant of Farrell. The defendant's responsibility thus becomes limited to such as may have been involved in the presence in that room of the material which was there, and under the circumstances of its being there. This responsibility must, of course, be determined in view of the positive requirement of the master that he shall use reasonable care to provide reasonably safe appliances and instrumentalities for his servants in their work, and upon the theory which the defendant's position assumes—that the supply of material in this factory room is to be regarded as the 'provision' in that regard, within the meaning of the law.
>
> "This view of the situation, however, does not terminate the master's duty and fulfill its requirements prior to the intervention of an act of negligence, and of the very act in which the court has found the negligence to have consisted, to wit, the provision of the defective planks in question, as instrumentalities designed and fit to be used for the work for which they were used. The plank, with the plainly visible knot in it—extending nearly across its width and through its entire thickness—was in this room. So, also, was the other defective and unfit plank which gave way. It is to be borne in mind that this room in question was one in which the defendant kept planks and boards 'provided and stored expressly for use in the construction of stagings or platforms when necessary in the installation of elevators.' The room did not contain

a miscellaneous supply or haphazard collection of lumber. The questions which would be presented by such a condition need have no consideration here. It was the storage place for material set apart, designed, and devoted by the defendant to the special use to which it was in fact put, with the fatal consequences which furnish the occasion for this suit. This segregation of material was the defendant's act, and, as our assumption involves the treatment of it as the defendant's provision, and its only provision, of the necessary reasonably suitable material, it follows that the same fault which Maynard later committed in selecting for use in a particular case the palpably defective plank which gave away—as it might have been expected to do—was earlier committed by the defendant when it selected and set apart the same plank, with its palpable defect, for use generally by its servants under circumstances like those in which it was used by Maynard and Farrell. Twomey *vs.* Swift, 68 L. R. A. —, 163 Mass., 273, 39 N. E., 1018. This, it will be observed, is not the case where the master has furnished a supply of appliances all free from defect, known, or which ought by the exercise of due diligence to have been known, and sufficient for the work for which they are apparently adapted, and the servant has been careless in his selection therefrom for use. It is a very different case, where some of the appliances provided are palpably defective, and for that reason distinctly unfit in their quality to perform the work which might be reasonably expected of them. In the one case the sole negligence lies in the selection for immediate use.

"In the other, there is negligence behind the selection for use, however negligent that selection itself may have been, to wit, negligence in the initial provision of the article as one suitable for use. Neither is this a case where appliances have been put to a use or strain which was unusual, or not to have been reasonably anticipated by the master. The situation which caused the break

was the natural and normal one incident to the work for which the planks were designed, and the use and strain that which must have been foreseen when they were provided.

"But it is said that Maynard, as a skilled and competent man provided by the defendant, ought, in the exercise of reasonable care on his part, to have detected the defective planks, and discarded them, and that the accident was therefore attributable to his fault, and not chargeable to the defendant's. In so far as this contention involves the assertion of any benefit to the defendant from the fact of its having employed, in Maynard, a man competent to select suitable material and build a suitable staging, it runs counter to the defendant's main contention that Maynard was in no respect its representative, doing its duty as master. In so far as it asserts immunity from responsibility for the reason that reasonable care on the part of Maynard would have prevented any unfortunate consequence accruing to Farrell from its negligent act, it is without legal justification. The intervention of negligence on Maynard's part would not suffice to absolve the defendant from liability for consequences for which its failure to exercise reasonable care was an efficient cause. Ashborn *vs.* Waterbury, 70 Conn., 551, 40 Atl., 458; Carstesen *vs.* Stratford, 67 Conn., 428, 35 Atl., 276; Ring *vs.* Cohoes, 77 N. Y., 83, 33 Am. Rep., 574; Louisville, N. A. & C. R. Co. *vs.* Lucas, 119 Ind., 583, 6 L. R. A., 193, 21 N. E., 968; Carterville *vs.* Cook, 129 Ill., 152, 4 L. R. A., 721, 16 Am. St. Rep., 248, 22 N. E., 14; Ricker *vs.* Freeman, 50 N. H., 432, 9 Am. Rep., 267; Grand Trunk R. Co. *vs.* Cummings, 106 U. S., 700, 27 L. ed., 266, 1 Sup. Ct. Rep.

"It is claimed that the defendant is saved from responsibility because the wire company had in its building, convenient to the place where the elevator was being installed, ample material suitable for the construction of the staging, and that permission to use this material was, prior to the beginning of the defendant's work of installation,

> obtained by the defendant, through Maynard. If it be assumed that this lumber belonging to the wire company was, by the course pursued, divided by the defendant for its work and workers, within the meaning of the law, the result is none other than that the defendant's supply of good material which might have been used was larger than it otherwise would have been. The presence of the knotty and unfit plank among the material provided, due to the defendant's act, would still remain and its responsibility therefore continued, This feature of the situation, therefore, adds nothing of significance to that which we have assumed to exist in the room at the defendant's factory. We have assumed that there was there a sufficient supply of that which was suitable for use which might have been taken and used by Maynard. Whether this supply was greater or less can be of no legal consequence."

The foregoing case is analogous to the case at bar in this, that the defendant, through O'Connor, furnished the planks to Cosgrove for the particular purpose of erecting the scaffold, and among those planks was the defective plank responsible for plaintiff's fall.

The duty imposed upon the particular contractor to furnish proper material can in no way be delegated to an employee so as to relieve the particular contractor from his liability. An employee is entitled to assume at the outset that the master has performed his absolute nonassignable duty under the law, and no custom can impose upon the employee, a third person, and the person that is injured any duty which would in any way relieve the particular contractor whose duty it is to furnish the material for construction from liability. In this case the planks for the scaffolding were furnished by the defendant for a particular purpose by its superintendent and foreman, O'Connor. This duty was a nonassignable duty so far as the defendant was concerned, and Cos-

grove was under no duty to inspect the lumber that was furnished for the scaffolding, nor could any negligent inspection of Cosgrove relieve the defendant from liability. The duty of the defendant was not to furnish material in general from which its employees could select what they needed for different classes of work and scaffolding, but to furnish the particular lumber for the purpose of scaffolding and staging solely. Nor was it incumbent upon any one of these servants to inspect the implements which the master provided him, upon and with which he did his work, but he had a right to rest upon the assumption that the master would and had performed the obligations and the duties which the law impose upon him, to exercise reasonable care to provide him with reasonably safe scaffolding upon which to work.

Ehlen *vs.* O'Donnell, 68 N. E. Rep., 766, Sup. Ct., Ill., Oct. 26, 1903.

Allison *vs.* Stivers, 106 Pacific, 996, Sup. Ct., Kansas, Feb. 12, 1910.

The duty of the master being primary could not be delegated to another, or to a fellow-servant so as to exempt the master from liability for injury resulting to one employee from the master's negligent failure to provide a reasonably safe place or appliances for doing his work.

Weideman Brewing Co. *vs.* Wood, 87 S. E. Rep., 772.

Again the record does not bring this case within the general proposition of law referred to by the appellee, because the record does not affirmatively show that the defendant furnished sufficient suitable material from which the alleged fellow-servants of the appellant might have erected this scaffolding.

At page 21 of the record Cosgrove testifies that at the time the scaffolding was originally built Mr. O'Connor brought up the lumber that was used in the scaffolding, in the hall, and from the hall they were used by Cosgrove.

O'Connor testified on page 24 of the record that he furnished twelve new planks to Cosgrove with which to build the scaffold and put them on the top floor right alongside of the scaffolding. He further says that there were several planks left over, and that they were there at the time of the accident. As against that, Teeple testifies (p. 18) that he never did see any timber around the place at the time of the accident; that he didn't notice a pile of planks in the corridor close to the scaffolding at the time of the accident; and on redirect examination he testified that there was a scarcity of timber about August 25th; in fact, that there was not much timber on the job, and when you had to have planks to construct anything you had to go around and get the timber the best you could; that he never saw any timber around the place; that you had to get any old timber you could.

Poore (p. 20, testifies that there were two planks on it (referring to the scaffold), but one had been taken down and used for bracing pipes by one of the steamfitters. There had been very few planks there, and the steamfitters used whatever they could get their hands on. That he does not know who cut up the planks and does not know who moved the second plank; he knows the plank was there (on the scaffold).

This is a disputed question of fact, to be decided by the jury. If we take O'Connor's testimony at its best, we find that there were four planks left over after the original scaffolding was built, but there is no evidence in the record to show that these planks were any better or more suitable for the building of the scaffolding than the defective plank that was used.

From the evidence of the plaintiff in the case, there was no lumber there that was not in use on the day on which the accident happened other than the board which was defective, so that instead of having the record comply with the rule of law that it must affirmatively show that there was other suitable material for the erection of the scaffolding, we have in the record facts which negative this idea. Viewing the case from the standpoint of the plaintiff, it should have been left to the jury to say whether or not, from all the evidence in the case, there was other sufficient lumber there that could have been used for this scaffolding by the fellow-servants of the plaintiff.

The rule of law that requires the master to show affirmatively that there was other suitable material, is based on the soundest of reasoning. It is a fact that is more within the knowledge of the master than that of the servant, particularly a servant that had nothing at all to do with the selection of the particular scaffolding. And the master should show by positive evidence that he had complied with his duty as to this third person, who was ignorant of the manner in which the scaffolding was erected. As an original proposition, the breaking of the board is of itself evidence of the furnishing of unsuitable lumber, and therefore he should rid himself of the liability imposed thereby, by showing affirmatively that there was other lumber there that could have been used by the fellow-servants of the party injured.

In the case of Howland *vs.* National Blowers Works et al., 114 N. W., 797, Supreme Court of Wisconsin, Jan. 28, 1908, the Supreme Court of that State, after reviewing the evidence in the record before it, said:

> "The evidence is quite vague and unsatisfactory. Neither the direct or the cross-examination of the witnesses was carried far enough to bring out the

> facts on which the case in all probability must ultimately turn."

Further on they say:

> "We conclude from this evidence that it did not affirmatively appear *as it must*, from the evidence on the part of the plaintiff in order to justify a nonsuit on this ground, that the master had furnished suitable material for the construction of this scaffold, from which the plaintiff could have made a proper selection. This showing is essential in order to bring the case within the fellow-servant rule above referred to."

Again, it was a question of fact for the jury to decide in this case whether or not the original use for which this scaffold was erected, had not terminated. There is affirmative evidence in the record showing that it had. The evidence further shows that the use to which it was being put at the time that the injury to the plaintiff occurred, was under the direct order of the superintendent and foreman O'Connor. That O'Connor was such superintendent and foreman is testified to by at least three witnesses. The fact that he denies it might raise a question of fact for the jury, but can not be considered conclusive on this point. If O'Connor representing the master, as he did represent the master, acquiesced in the use of this scaffolding, for the purpose for which it was being used at the time of the injury, the master, through O'Connor, thereby adopted it, or if it was the duty of the company to provide this place, and there were no other means provided to get the pipes to the place where the plaintiff was attempting to carry the pipe at the time he was injured, then this runway or scaffolding was furnished by the defendant, or adopted by him in its condition, as it was on the day of the injury, and all questions as to whether or not in its

original construction, it was erected by a fellow-servant or not, has nothing to do with the question of liability of the defendant to the plaintiff.

Thus, where a staging was constructed as plaintiff's fellow-servant suggested to the defendants, to which defendants assented, it was defendant's duty to furnish proper materials; and in permitting the use of insufficient boards and in not offering other material they authorized the use of that which was defective, and were liable for injuries sustained by the plaintiff by a fall of the scaffold due to such defects.

> Dunleavy *vs.* Sullivan, et al., 85 N. E. Rep., 866 (Supreme Court of Massachusetts, Oct. 21, 1908).

In this case the court in its decision admits non-liability on the part of the defendants as to the original erection of the scaffolding, but they say that when the fellow-servants procured lumber other than that furnished by the defendants, that such lumber became the lumber furnished by the defendants when they, the defendants, had knowledge that the lumber was being used by the plaintiff and his fellow-servants.

In Allison *vs.* Stivers, 106 Pac. Rep., 996, the scaffolding was erected by the bricklayers, and afterwards adopted by the master for the use of the carpenters. After the bricklayers finished their work, they left, leaving the scaffolding there. When the carpenters came upon the work, the master ordered them to use that scaffolding, and the court held that although the bricklayers and carpenters were fellow-servants, the use of the bricklayers for the scaffolding had terminated, and that the use of the scaffolding by the carpenter was by express direction of the master, and that as the master was compelled to furnish him a safe place and appliances, if the place was not safe, the master had violated his duty.

From these authorities it will appear that the question was whether or not the scaffolding was safe at the time of the injury to the appellant. The fact that originally a proper and suitable scaffolding was erected and used is no defense, if between its original use and the use at the time of the injury to the plaintiff, the scaffolding was so demolished, and known to have been so demolished by the master, through its agents, as to make it unsafe and insecure. On the evidence there is no question that this scaffolding was so demolished, and the reason for its demolition was the scarcity of timber, which material it was the duty of the master to provide.

On the queston as to whether or not this record shows sufficient evidence to go to the jury, of a defective plank, the authorities are all one way. The original brief cites an opinion of Mr. Justice Lurton, now on the United States Supreme Court Bench. In addition thereto we desire to call the court's attention to the following cases:

In the case of Green *vs.* Banta, 48 N. Y. Superior Court Reports, 157, the plaintiff and several other hod-carriers were dumping bricks upon a scaffolding, and the plaintiff was injured by a fall. The court speaking of whether or not there was sufficient evidence of negligence on the part of the defendant, said:

> "There was no error in the charge of the court relating to a presumption of negligence on the part of the defendant Banta. The charge was this: The fact that the scaffolding gave way is some evidence—it is what might be called prima facie evidence of negligence on the part of the person or persons who were bound to provide a safe and proper scaffold."

In the case of Dunleavy *vs.* Sullivan, supra, the court says:

> "The defendants have also contended that there was no evidence that the two-by-three board which split was unsuitable. In support of this

> contention they urge that on the evidence it was no more likely that the split came from the wood being unsuitable than from its having been nailed and renailed onto the Russell Building some six times, but the jury were not warranted in finding that the board was adopted by the defendants as their material after it had been renailed these six times, and we are of the opinion that the fact that such a board split under the circumstances under which it split in the case at bar is evidence from which the jury were warranted in inferring that it would have been seen to be unfit, if it had been inspected."

In Kelly *vs.* Union Pacific Railroad Co., 48 Pacific Reporter, 844 (Supreme Court of Kansas, May 8, 1897), the court say:

> "The contention that there is no evidence tending to show negligence is unsound. It was for the jury to say whether a beam about seven inches square and thirty-two feet long was made reasonably secure by two iron bolts driven into the piles for the purpose of supporting not only its own weight but that of the plank placed across it and the men with their tools working upon it."

In Barclay *vs.* South Atlantic Waste Company (supra), the court said:

> "The evidence of the witness Wooten is to the effect that the scaffolding was built of old material that was scorched in the fire when the building was burned. There was also evidence that the wood was knotted, and that the piece which gave way was broken at the knot. These contentions, if true, do not per se constitute negligence, but we think they are some evidence to be considered by the jury as bearing upon the inquiry as to whether defendant exercised reasonable care in selecting material suitable for the construction of a lofty scaffold upon which its servants were required to work."

In the case of Forbes *vs.* Dunnivant, 95 S. W. Rep., 934 (Supreme Court of Missouri, June 30, 1906), one of the questions involved was negligence on the part of the defendant in furnishing unsafe and unsuitable material, and it was argued that there was no sufficient evidence of unsoundness to go to the jury.

The court, in reversing the case, said:

> "But as said heretofore, there being evidence that the board was unsound, it was for the jury to say whether they would believe plaintiff's contentions or defendant's contentions. One thing is clear, the board broke, and to that extent the thing speaks for itself."

From these authorities it would appear that it is not necessary to have expert evidence as to soundness or unsoundness of a board of the character of the board in question in this case. That a knot will weaken a board is matter of common knowledge. The fact of the board breaking at the knot, and at a point not in the center of the board, is evidence that the cause of the break was the knot.

On the question of the unsoundness of this board the plaintiff was entitled to go to the jury.

For these reasons, it is respectfully submitted that the judgment of the lower court should be reversed, and the cause remanded in order that a jury may decide the question of fact raised by the evidence.

Respectfully submitted.

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